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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. ERIC DOUGLAS CHANEY, Defendant and Appellant.	A106034 (San Mateo County Super. Ct. No. SC054008)

Eric Chaney (defendant) appeals following his felony conviction of making a criminal threat in a telephone call to Detective Mark Pollio (Pen. Code § 422),[1] and two misdemeanors involving driving under the influence of alcohol (Veh. Code, § 23152, subds. (a) & (b).) The court suspended imposition of sentence and placed defendant on probation for five years.

Defendant contends that his conviction for violating section 422 must be reversed because (1) the evidence was insufficient to establish that he made a criminal threat; and (2) the court erred by not, sua sponte, instructing on a violation of section 71 as a lesser included offense. He also contends that the court erred by imposing a $20 court security fee pursuant to section 1465.8, because he committed his offenses prior to the date section 1465.8 became effective. We shall affirm the judgment.

* Under California Rules of Court, rules 976(b) and 976.1, only the two introductory paragraphs, Part II of the Analysis section and the Conclusion are certified for publication.

[1] All subsequent statutory references are to the Penal Code unless otherwise indicated.

FACTS

May 1991—Officer Calderhead Cites Defendant

The long and convoluted trail that led defendant to make the telephone call to Detective Pollio on April 25, 2003, that was the factual basis for the section 422 conviction, began with a traffic stop in May 1991. Officer Calderhead stopped defendant for following a vehicle too closely, and cited him. After making his initial contact with defendant, Officer Calderhead called for a cover officer because defendant was "extremely verbally abusive." Defendant told both officers that there were a lot of police injustices, and he was going to do something about it.

Officer Calderhead appeared in court for the ticket he had issued to defendant. Defendant became physically upset, and shook uncontrollably, as he testified that he was a member of San Mateo County Police Watch.[2] Defendant's testimony that he had interviewed Calderhead's second grade teacher caused Officer Calderhead some concern. Over the next two years Officer Calderhead encountered defendant in traffic court at least 10 times on citations Calderhead had issued to other drivers. Defendant would occasionally testify that San Mateo Police Watch had targeted Calderhead, and was watching him. Defendant also appeared at traffic stops Officer Calderhead made. Eventually, Officer Calderhead explained his concerns about defendant to his supervisor, and was told to document any incidents.

April–May 1992—Detective Pollio Interviews Defendant After A Shot is Fired at Officer Calderhead's House

In the evening of April 24, 1992, Officer Calderhead was at home, and heard a gunshot. He went outside to investigate, but did not see anything. The next day he noticed a bullet hole on the side of his garage, and found a bullet lodged in the heating duct. He called the police, and Detective Mark Pollio was assigned to investigate the incident.

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[2] Defendant had had the same physical reaction during his confrontation with Calderhead relating to the initial issuance of the traffic citation.

When Detective Pollio learned of the problems Officer Calderhead had been having with defendant, he and Detective Kathy Anderson interviewed defendant at his parents' home. Defendant denied knowing anything about the bullet hole found in Officer Calderhead's house. He suggested it might have something to do with Calderhead being a white supremacist. Defendant said he did not know where Officer Calderhead lived, or who would shoot at his house. After the interview, Detective Pollio closed the case. He learned later that defendant told Officer Calderhead he was sorry about the shooting, that it was not funny, and should not have happened.

June 1993—Defendant Threatens Detective Anderson and Slaps Officer Neal

Detective Anderson testified that, in June 1993, she went to the lobby of the police station to meet defendant because he asked to speak with her. He asked if she remembered who he was, and when she asked him to remove his sunglasses, he became loud and angry. He asked about the status of the investigation of the shooting at Officer Calderhead's house, and accused Anderson of fabricating the shooting incident. Detective Anderson explained that Detective Pollio was in charge of that investigation, and she did not know anything about the status. Defendant accused her of lying, and began shaking. Hoping to calm him down, she asked him to step outside, and he responded that he was going to "kick [her] ass." When they went outside, defendant informed Anderson that she was "finished," and that she would pay for what she had done. He did not say how she would pay, but did say, at one point, that he would sue her in federal court. She asked whether defendant was threatening her. He did not respond, but continued to point at her. When he saw another officer come out, he got in his car and sped away.

Detective Anderson was concerned for herself and Detective Pollio, and told him about the incident. She also told him she was considering seeking a restraining order against defendant. Defendant never did sue her in federal court, but did file a small claims court complaint against her, which he voluntarily dismissed.

Also in June 1993, Detective Pollio learned that defendant had slapped or pushed Officer Karen Neal outside of traffic court. Officer Neal testified that, as she was leaving

court, defendant slapped her on the shoulder. She lost her balance, and turned around. Defendant, whom she did not know, said sarcastically: "You better watch what kind of tickets you write." She wrote down defendant's license plate number, and made a report of the incident.

October 1993—Defendant Confronts Detective Pollio

In October of 1993, Detective Pollio was called to the lobby of the police department by a desk clerk, who stated that there was a person claiming to have an appointment with him. Detective Pollio went to the lobby together with Detective Pat Wilkinson. Defendant demanded to know the status of the investigation of the Calderhead shooting incident. He accused Detective Pollio of violating his privacy rights by asking him about "a drive-by shooting that never even took place." Defendant warned Detective Pollio that he and Detective Anderson were in big trouble, and would face federal and state prosecution. Detective Pollio testified that he did not face state or federal prosecution for the 1992 interview of defendant and that defendant never sued over it.

April 2003—Defendant Calls Detective Pollio

On April 22 or 23, 2003, defendant called Redwood City Police Chief Carlos Bolanos and asked if he knew how bad Detectives Pollio and Anderson were. Defendant was agitated and upset. Chief Bolanos told defendant that he was unaware of any problems with either officer, but that defendant could file a citizen's complaint if he believed either officer had done anything inappropriate. Defendant did not indicate any interest in filing a complaint. Chief Bolanos told Detective Anderson about the call.

On April 25, 2003, defendant called Detective Pollio. The call was recorded and transcribed. At the beginning of the call defendant identified himself and reminded Detective Pollio that he "showed up at [defendant's] home in the month of May in the year of 1992 regarding Charles Calderhead." After defendant made several comments about Pollio having committed police misconduct in 1992, he accused Detective Pollio of being "a threat to society" and a "thug." Defendant stated that he had called Chief Bolanos, and would "continue to inform anyone that you answer to what an absolutely

[sic] liar, sociopathic thug you are." Defendant also stated that he would be "more than happy" to confront Detective Pollio "face to face." Detective Pollio finally asked: "What is the purpose of your call? Is this to threaten me?" Defendant responded: "You know what, that's correct. *This is a threat.* I am never, ever, never and will never, ever, never forget the fact that you committed acts of color of the law, police brutality, betrayal of the public trust, in that you co-conspired." When Detective Pollio again asked: "What is the purpose of your call?" defendant reiterated: "*To threaten you.*"

"[Pollio]: To threaten me with what? What are you going to do?

"[Defendant]: Make sure that everyone that you answer to knows what a liar and a thug you are. I've seen you on television I don't know how many times when you starred in the Unsolved Mysteries episode and your uncovered videotape.

"[Pollio]: What is the purpose for you to harass me?

[¶] . . . [¶]

"[Defendant]: I knew you would accuse me of that. In fact I'm surprised you're not accusing me of stalking you. And you know what? If you need to see me face to face, I would be more than happy to come down there right now and confront you.

"[Pollio]: Now what do you mean 'confront' me?

"[Defendant]: Let you know, while you look me in the eye, that I know who you are and I know what you're capable of. You are a liar, you are a sociopathic thug, you have co-conspired and committed acts of collusion . . . ."

Detective Pollio testified that he was, at this point, concerned because defendant explicitly stated his purpose was to threaten Pollio and it was not common in this type of conversation for a person to state he "would come down and confront me personally."

Detective Pollio informed defendant it is illegal to make threatening telephone calls. Defendant responded by repeating that he thought Detective Pollio needed to see him face to face, and reminded Pollio of the time in June 1993 when he told Pollio he was under federal investigation. Detective Pollio stated that the federal investigation was an "illusion" that only defendant saw. Defendant became angrier, and stated, "You don't know what I know about you. You don't know what I've learned in the ten-year interim

that you confronted me face to face. [¶] . . . [¶] . . . *I know who you are, I know where you live, I've seen your wife, I've seen your daughter.* You think you've got something on me you fuckin' faggot, you've got nothing. You are a goddamn fucking thug. You are a sociopathic liar."

Detective Pollio testified that it caused him extreme concern that defendant appeared to have accurate information about who lived at his house. One of his daughters had moved out the previous year, and now he lived only with his wife and one daughter. He explained that police officers take measures to prevent the public from learning their address because of concern that people angered by an arrest or other police conduct would "cause problems or hurt us." Detective Pollio was also concerned because he knew defendant had been a potential suspect in the shooting of Calderhead's house. He therefore decided to find out more about defendant's intentions.

"[Pollio]: But you say you haven't been stalking me?

"[Defendant]: When have you ever been harmed by me. Name it!

"[Pollio]: Right now.

"[Defendant]: Good! I hope you fuckin'. . .

"[Pollio]: You're committing a crime.

"[Defendant]: Remember this conversation because you know what? I'll show up down there at the police station right now and I'll confront you face to face, eye to eye mister. You're a liar, you're a thug and you have gone on to attract as much attention as you can possibly get to make up for what your parents never showed you. I have seen you on TV, I have spoke [sic] to the TV producers who interviewed you on Unsolved Mysteries, I know who you are!

"[Pollio]: Are you threatening now to come down here, is that what you're doing? Is this in furtherance of your threat?

"[Defendant]: Do you want me to? Do you want me to? Do you want me to? I have spoke [sic] to the TV producers.

"[Pollio]: I don't even want you calling me.

"[Defendant]: Back in the year 1996. They told me who you are! I know who you are!

"[Pollio]: I don't even want you calling[,] do you understand that?

"[Defendant]: I know who you are[,] Mark! I know who you are[,] Mark! You're a liar and a thug and you're a sociopathic freak of nature.

"[Pollio]: I'm not sure of what this is accomplishing.

"[Defendant]: You know what! What this is accomplishing is that I will make sure before you end up like Mark Peterson, murdering your wife and your daughter you fucking freak. I know who you are and I know what you are capable of. I know who you are. You are a goddamn fucking mentally ill freak of nature, liar, you are a thug and you have constantly, constantly participated in acts of police brutality, police misconduct, color of the law, betrayal of the public trust and abuse of the public."

Detective Pollio asked a few times why defendant was stalking him, and defendant denied it. Pollio asked: "Then why is it you know where I live then? What does that have to do with my wife or my daughter or my son, whatever I have?" Defendant replied: "I'm concerned about their well being," and that he was going to "make sure their well being is okay." Detective Pollio then tried to ascertain if defendant really knew where he lived. After a cat-and-mouse exchange culminating with Pollio asserting that defendant did not know, defendant said: "You know what? I'm going to fuck with your head and leave you to believe whether I do or I don't. You'd like to believe that I don't know where you live." After some more repetition of similar conversation Pollio asked if there was anything more defendant had to say. Defendant said. "What I need you to know is that I will follow you for the rest of your life. I've got you now. We're talking about you ten years after the fact when I first saw you face to face. And if I see you again, *I will make sure that I do everything I can to cause as much harm and destruction* in your life for being a fucking sociopathic, lying thug that you are."

Detective Pollio testified that defendant's comments about his wife and daughter made him fearful, especially because he knew that defendant had been a suspect in the

shooting of Office Calderhead's house. Another factor that raised Polio's concern was that defendant had made strange baseless accusations against Calderhead, and now Pollio, and appeared not to be "playing with a full deck," i.e., was mentally unstable. Pollio further testified that, at the point in the call where defendant started to express concern for the well-being of Pollio's wife and daughter, defendant's tone of voice changed to "an odd and eerie lowering of the voice" like in "a horror movie, like a psycho-type of movie." It was clear to Pollio that defendant had been watching him, and would continue to be watching, him. His statements made Detective Pollio think of stalking cases where the ex-husband or boyfriend would not let go of the relationship, and would pursue the victim for years, ultimately ending in violence. He also was fearful because defendant appeared to be connecting him with Scott Peterson, and Pollio interpreted defendant's comment about protecting the well-being of Pollio's wife and daughter, and preventing him from ending up like "Mark Peterson, murdering your wife and your daughter" to mean that defendant was "gonna do something before I end up like that. And I don't know how he would do that, except one way would be to try to kill me, or in some perverted way, to kill my family."

Yet, when Detective Pollio directly asked defendant if he was threatening to physically harm him, defendant denied it.

"[Pollio]: You're threatening to physically harm me now, the next time you see me?

"[Defendant]: Why would I do that?

"[Pollio]: That's what you just said.

"[Defendant]: The law can take care of that. I can send you to jail and have the guards just beat you up behind bars.

"[Pollio]: All right, well. . .

"[Defendant]: Why would I need to physically harm you?

"[Pollio]: That's what you just said.

"[Defendant]: Wait, wait, wait, wait, wait. The District Attorney can prosecute you, we can put you behind bars and end you up in an orange jumpsuit and you can get the shit beat out of you in prison. Why would I need to physically harm you?

"[Pollio]: So you're not threatening me?

"[Defendant]: Physically?

"[Pollio]: Yeah.

"[Defendant]: I wouldn't think of laying a hand on you, you're not worth it. My God, my God, what would I do. End up with SARS? You fuckin' freak.

"[Pollio]: Okay, I'm going to conclude this call. I don't want to hear from you again, do you understand that? Do not call me again."

"[Defendant]: No, I do not understand that.

"[Pollio]: Why do you not understand that?

"[Defendant]: Because I will never ever never never ever let you go in terms of the fact that you are a sociopathic threat to society."

At this point, Detective Pollio ended the call. Detective Pollio was in fear that defendant might murder him, or a member of his family. In his 25 years of service he had never received a threat of "this level and intensity." He did not believe defendant's denial when Pollio directly asked whether he was threatening physical harm. Pollio explained: "I think, by my question of trying to get him to articulate it even more, I felt he was just being coy, and at that point, backed off of that, but yet, never backed off of his interest in seeing me physically hurt. The point where he says that he wouldn't do it, but that he would have the guards do it, once he got me put in jail." Despite defendant saying Detective Pollio was "not worth" physically harming, Pollio was not reassured, because "obviously, I am worth it. After 11 years, he still is angry at me. [T]his is more anger than he has ever demonstrated to me even on the past two contacts." At the time of his testimony Pollio was still in fear that defendant might commit a crime resulting in serious injury to himself, or his family. He explained: "If you take any one piece out of this, that's not it. It's the total. It's everything. It's from the past, from '92, from '93, what he's done with other officers. He physically hit one officer. He harassed and sued

another officer. And all this was based on maybe [a] 45-minute contact, where I didn't threaten him, didn't harass him, didn't even accuse him of doing anything. I was just asking him questions relating to the shooting. And what he was doing with Officer Calderhead, the watching him, the following, going to court, all that. And then, 11 years later, when I hadn't had contact with him for 10 years, he calls me, and we get this extensive threat on the phone." He was also concerned because defendant was "never eliminated" as a suspect in the Calderhead shooting.

Within 15 minutes of hanging up, Detective Pollio was called to an emergency stakeout to arrest a fugitive in an unrelated case. He had time to play the tape for Detective Anderson before leaving. Detective Anderson notified other officers that defendant might be coming to the police department.

At 12:40 p.m. defendant did appear at the Redwood City Police Department, and demanded to speak to the watch commander. The clerk recognized defendant from a photograph on a bulletin. She was frightened, and told defendant she would get the watch commander. When she returned to the front counter, defendant was gone. Sergeant Sheffield found defendant in the parking lot, sitting in his car, with the engine running. He was very agitated and appeared to be under the influence of alcohol. An Intoxilyzer breath test administered at 3:10 p.m. showed a blood alcohol content of .09 percent, which, an expert testified, meant that defendant's blood alcohol content at 12:40 p.m., when he was last seen driving, would have been approximately .14 percent.

ANALYSIS

I.

Violation of Section 422

To prove a violation of section 422, the prosecution must show that defendant (1) "willfully threaten[ed] to commit a crime which [would] result in death or great bodily injury to another person"; (2) made the threat "with the specific intent that the statement . . . be taken as a threat, even if there [was] no intent of actually carrying it out"; (3) the threat was "on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the

person threatened, a gravity of purpose and an immediate prospect of execution of the threat"; (4) the threat caused the person threatened "reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety"; and (5) the threatened person's fear was "reasonabl[e]" under the circumstances. (§ 422.) Defendant contends that his conviction for violating section 422 must be reversed because, although the statements he made in his telephone call to Detective Pollio on April 25, 2003, were admittedly offensive, they were protected speech under the First Amendment to the United States Constitution and did not constitute a criminal threat within the meaning of section 422.

Our state Supreme Court recently concluded that, because making a criminal threat implicates the First Amendment, the reviewing court must apply the independent review standard to the trier of fact's determination that a communication constituted a criminal threat whenever the defendant raises a First Amendment defense.[3] (*In re George T.* (2004) 33 Cal.4th 620, 632.) This standard is "not the equivalent of de novo review 'in which a reviewing court makes an original appraisal of all the evidence to decide whether or not it believes' the outcome should have been different. [Citation.] Because the trier of fact is in a superior position to observe the demeanor of witnesses, credibility determinations are not subject to independent review, nor are findings of fact that are not relevant to the First Amendment issue. [Citation.] As noted above, under the substantial evidence standard, the question is whether any rational trier of fact could find the legal elements satisfied beyond a reasonable doubt, whereas under independent review, an appellate court exercises its independent judgment to determine whether the facts satisfy the rule of law." (*In re George T., supra*, at p. 634.) We therefore must defer to the jury's credibility determinations, but make an independent examination of the whole record, including a review of the constitutionally relevant facts.

[3] Defendant raised a First Amendment defense in his section 995 motion and argued to the jury that he had a First Amendment right to say "anything you want, unless in violates very specific elements." We need not resolve the Attorney General's contention that these steps did not raise a plausible First Amendment defense, because we also affirm under the substantial evidence standard he contends is applicable.

Defendant argues that he did not make a criminal threat within the meaning of section 422, because he never "expressly threatened Pollio with physical harm, much less a crime which will result in death or great bodily injury." Nor, he argues, were his statements "so unequivocal, unconditional, immediate, and specific as to convey to the person threatened a gravity of purpose and an immediate prospect of execution of the threat." (§ 422.) Instead, defendant suggests, he merely promised to pursue Pollio using all legal means available to him, such as (1) continuing to track Pollio's career, and informing Pollio's superiors of his misconduct; (2) confronting Pollio by looking him "in the eye" and letting him know that he knew who Pollio was and what he was "capable of"; and (3) reporting Pollio to the district attorney, or other authorities. He asserts that we should accept at face value his own "clarification" of his remark about knowing where Pollio lived, and having seen his wife and daughter, as nothing more than a sincere expression of concern for "their well being." Similarly, he argues his comment: "And if I see you again, I will make sure that I do everything I can to cause as much harm and destruction in your life for being a fucking sociopathic, lying thug that you are," could not reasonably be construed as conveying a threat of physical harm, because, when Pollio directly asked, defendant denied that was what he meant. Moreover, defendant asserts that there was no evidence that he had, in the past, used, or threatened to use, a weapon or significant force approaching great bodily harm. (Cf. *People v. Gaut* (2002) 95 Cal.App.4th 1425, 1431 [defendant had a history of physical assault]; *People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1341-1342 [victim and defendant were gang members, and defendant threatened the victim after he gave testimony against defendant's brother].) Defendant concludes that his call was "unpleasant and deeply offensive, but it was still nothing more than an emotional outburst, an interminable and angry rant." (*In re Ryan D.* (2002) 100 Cal.App.4th 854, 861 [section 422 " 'was not enacted to punish emotional outbursts, it targets only those who try to instill fear in others' "].)

Defendant's interpretation of the statements he made in his call to Detective Pollio depends upon careful parsing and isolation of phrases, consideration of the meaning of

words out of context, without regard to the tone of delivery, and other circumstances, and upon consistently crediting defendant's express denials when directly confronted by Pollio regarding his intent and meaning. As we shall explain, in accordance with the standard of independent review, when considered as a whole, and against the history of contacts between defendant and Pollio and other officers, and in light of other surrounding circumstances, the statements made did constitute a criminal threat within the meaning of section 422.

"A communication that is ambiguous on its face may nonetheless be found to be a criminal threat if the surrounding circumstances clarify the communication's meaning." (*In re George T., supra*, 33 Cal.4th at p. 635, citing *People v. Butler* (2000) 85 Cal.App.4th 745, 753-754.) A purported threat must be examined on its face, in context, and in light of the surrounding circumstances, to determine if it conveyed gravity of purpose and immediate prospect of execution. (*In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1137.) Relevant circumstances include the prior history between the perpetrator of the threat and the victim, including quarrels, prior threats, and violence against the victim, or others. (*Id.* at p. 1138.) To constitute a threat within the meaning of section 422 it is not necessary that the words expressly specify a crime involving death or serious bodily injury. (*People v. Butler*, *supra*, at pp. 753-754.) "When the words are vague, context takes on added significance, but care must be taken not to diminish the requirements that the communicator have the specific intent to convey a threat and that the threat be of such a nature as to convey a gravity of purpose and immediate prospect of the threat's execution." (*In re George T., supra*, at p. 637.) Section 422 does not require an immediate ability to carry out a threat (*People v. Lopez* (1999) 74 Cal.App.4th 675, 679-680), and an ambiguous statement that does not express the time or manner of execution may nonetheless violate section 422 when it is viewed in light of the surrounding circumstances. (*People v. Butler*, *supra*, at p. 752.) " '[U]nequivocality, unconditionality, immediacy and specificity are not absolutely mandated, but must be sufficiently present in the threat and surrounding circumstances . . .' " to convey a gravity

of purpose, and immediate purpose. (*People v. Bolin* (1998) 18 Cal.4th 297, 340, quoting *People v. Stanfield* (1995) 32 Cal.App.4th 1152, 1157.)

Defendant expressly stated at the outset of his call that his purpose was to threaten Detective Pollio. Nor can there be any doubt that his intent was to convey a threat and instill fear in Detective Pollio. The only reasonable construction of defendant's statement that he was "going to fuck with [Detective Pollio's] head," was that he intended Pollio to feel threatened and a sense of fear. Defendant stated that he knew where Pollio lived with his wife and daughter, and asserted that he was going to "make sure" that defendant would not "end up like Mark Peterson, murdering your wife and your daughter." When Pollio asked what he meant, defendant, in what Pollio described as an eerie low tone, stated he was going to "[m]ake sure that their well being is ok." Later in the conversation he added: "[I]f I see you again, I will make sure that I do everything I can to cause as much *harm and destruction in your life for being a fucking sociopathic, lying thug that you are."* He also stated several times during the call that he would be happy to confront Pollio face to face, and did in fact appear at the police station a short time later.

Defendant argues that his words conveyed nothing more than concern for the well-being of Detective Pollio's family and an intention to hold Pollio legally accountable for police misconduct. He asserts that, because he never once expressly stated a threat of "physical harm, much less a crime which will result in death or great bodily injury," he did not make a criminal threat within the meaning of section 422. Yet, to constitute a threat within the meaning of Section 422, it is not necessary that the words themselves expressly refer to a crime involving death or serious bodily injury, if the context conveys that meaning. (*People v. Butler, supra*, 85 Cal.App.4th at p. 753 [defendant threatened to "hurt" the victim]; see also *In re Ernesto H.* (2004) 125 Cal.App.4th 298, 304 [student warns school official, "Yell at me again and see what happens"].) It is necessary to refer to context to ascertain meaning because " '[n]o one means all he says, and . . . very few say all they mean, for words are slippery and thought is viscous.' " (*In re Ricky T., supra*, 87 Cal.App.4th at p. 1137, fn. 6, quoting Adams, The Education of Henry Adams (1918) p. 451.)

When considered in context of all the surrounding circumstances known to Pollio going back to 1992, defendant's words conveyed a meaning that was the opposite of what he appeared to say, and in that sense his expression of concern for the well-being of Pollio's family is more akin to a mobster telling an extortion victim he hopes nothing happens to the victim. The relevant context was that Pollio knew that defendant had originally focused on Officer Calderhead, against whom he had made strange baseless accusations, and now appeared to have redirected his focus on Pollio. Pollio testified that defendant seemed not to be "playing with a full deck," i.e., was mentally unstable. Defendant, unprovoked, had slapped Officer Neal, who did not even know him. Although Pollio did not know of a specific incident where defendant used force likely to produce great bodily injury or death, defendant had not been ruled out as a suspect in the shooting at Officer Calderhead's home, and appeared preoccupied with it.[4] All of the foregoing indicated to Pollio that defendant was willing to cross the line between verbal confrontation and use of physical force. In addition, despite the lapse of 10 years, defendant's anger towards Pollio had not dissipated. In fact, Pollio described defendant's level of intensity and anger to be higher than in any of their prior contacts. Any remaining reasonable possibility that defendant was merely a civic-minded citizen expressing his intention to use all legal means to prevent police misconduct was eliminated by defendant's assertion that he knew where Detective Pollio lived, and that he lived with his wife and daughter. Defendant's claim to know the location of Pollio's private residence and the identity of his family members had no plausible connection with an intention simply to enforce legal penalties for police misconduct. His bizarre

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[4] Defendant argues, in his reply brief, that Detective Pollio's knowledge of the shooting is irrelevant to the determination whether defendant made a threat of great bodily injury of death, because the jury was instructed that defendant was never charged with that shooting and that it must "consider him to be innocent of that conduct." The same instruction also correctly stated that Detective Pollio's knowledge that defendant was a suspect in that shooting was relevant to its determination whether "Det. Pollio was reasonably in sustained fear after receiving the phone call on April 25, 2003 [and] whether the defendant had the required specific intent and *whether the April 25 phone call was a threat of great bodily injury or death*."

association of Detective Pollio with Scott Peterson, and avowal that he would prevent Pollio from murdering his wife and daughter, displayed a further departure from the normal activities of a citizen's police watch group. Moreover, in addition to his express acknowledgement that the purpose of the call was to threaten Pollio, defendant's comment that he would "fuck with [Detective Pollio's] head" clearly indicated that defendant knew the effect of his statements, and that he was enjoying that Pollio, despite his best efforts not to reveal his fear, appeared to be particularly concerned about the possibility that defendant knew where he lived, and that defendant intended that Pollio take his comments as a threat. In this context, it is entirely reasonable that Detective Pollio was not comforted by defendant's explanation that he was merely concerned about the "well-being" of Pollio's wife and daughter, and that Detective Pollio instead understood it, and the assertion that defendant would cause as much "harm and destruction" as possible in Pollio's life, as a threat to cause him, or his wife and daughter, serious bodily injury or death.

Defendant relies heavily upon the fact that, when Pollio asked him directly, he expressly denied an intent to threaten physical harm. It was not unreasonable in the context of this conversation for Pollio not to believe defendant's express denial that he was threatening physical harm. As Pollio explained, defendant was continuing the cat-and-mouse game, making a threat, and then being coy, and backing off of it, yet he "never backed off of his interest in seeing me physically hurt," suggesting that prison guards could beat Pollio up instead, once defendant got him in jail. The jury also clearly did not credit defendant's express denial of any intent to threaten physical harm. Even if we were not required under the independent review standard to defer to such credibility determinations, we would reach the same conclusion if we were making the determination in the first instance.

When coupled with defendant's repeated references to the need to confront Pollio face to face, and the fact that he did come to the police station within a short time after Pollio hung up on him, these circumstance also made the statements "so unequivocal, unconditional, immediate and specific as to convey to the person threatened, a gravity of

purpose and immediate prospect of execution of the threat." (See, e.g., *People v. Solis* (2001) 90 Cal.App.4th 1002, 1013-1014; *People v. Mendoza*, *supra*, 59 Cal.App.4th. at p. 1340.) "The four qualities are simply the factors to be considered in determining whether a threat, considered together with its surrounding circumstances, conveys those impressions to the victim," as opposed to statements which are, in context, jokes or political hyperbole. (*People v. Stanfield*, *supra*, 32 Cal.App.4th at pp. 1157-1158.) The fact that defendant merely engaged in drunken angry ranting when he arrived at the police station does not undermine this conclusion because it is not necessary under section 422 that the defendant actually intend to carry out the threat, only that he intended to convey it to the victim. (*In re David L.* (1991) 234 Cal.App.3d 1655, 1659.) The fact that he had no weapons in his car also does not change our conclusion, because the defendant need not have the immediate ability to carry out the threat. (*Id*. at p. 1660.)

For all the foregoing reasons, we conclude that defendant did not merely exercise his First Amendment rights, and instead made a threat within the meaning of section 422.

II.

Failure to instruct on Section 71 as a Lesser Included Offense

Defendant contends that the court erred by failing to instruct, sua sponte, on the offense of threatening a public officer (§ 71) as a lesser included offense of the charged offense of making a criminal threat in violation of section 422.[5]

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[5] After an in-chambers discussion on instructions on lesser included offenses, the court obtained defense counsel's assent that he was "affirmatively . . . requesting that I do not instruct on lessers." "When a defense attorney makes a 'conscious, deliberate tactical choice' to forego a particular instruction, the invited error doctrine bars an argument on appeal that the instruction was omitted in error." (*People v. Wader* (1993) 5 Cal.4th 610, 657-658); see also *People v. Barton* (1995) 12 Cal.4th 186, 195, 198 [doctrine of invited error bars review of asserted instructional error on appeal even though court has sua sponte duty to instruct on lesser included offense over defendant's objection].) A decision to request no instructions on lesser included offenses would be a reasonable tactical decision consistent with the defense that defendant did not commit any crime at all, but only exercised his First Amendment right to warn Detective Pollio that defendant would be vigilant against police misconduct, and use all legal means to prevent it. (*People v. Hardy* (1992) 2 Cal.4th 86, 184.) The record, however, is equivocal as to whether counsel made a tactical decision to request no instruction on any lesser included

"The definition of a lesser necessarily included offense is technical and relatively clear. Under California law, a lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser. [Citations.]" (*People v. Birks* (1998) 19 Cal.4th 108, 117; *People v. Sanchez* (2001) 24 Cal.4th 983, 988.) This determination is made in the abstract, according to the statutory elements test or the accusatory pleading test. The evidence introduced at trial is irrelevant to this determination. (*People v. Wright* (1996) 52 Cal.App.4th 203, 208.) A threat in violation of section 71 is not necessarily included within the offense of violating section 422 under either test.

The statutory elements of a violation of section 71 are: " ' "(1) A threat to inflict an unlawful injury upon any person or property; (2) direct communication of the threat to a public officer or employee; (3) the intent to influence the performance of the officer or employee's official duties; and (4) the apparent ability to carry out the threat." ' " (*In re Ernesto H.* (2005) 125 Cal.App.4th 298, 308; see also *People v. Hopkins* (1983) 149 Cal.App.3d 36, 40-41.) "The purpose of the statute is to prevent threatening communications to public officers or employees designed to extort their action or inaction." (*In re Ernesto H.*, *supra*, at p. 308, citing *People v. Zendejas* (1987) 196 Cal.App.3d 367, 376.) Under the statutory elements test, section 71 is not a lesser included offense of section 422, because a section 422 violation may be committed against *any person*, and does not require the specific intent to influence the performance of the public officer's duty, but rather only the intent that the statement be "taken as a

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offenses, or simply failed to identify any lesser included offenses, and specifically to consider whether section 71 might be applicable. Defense counsel qualified his request that the court not instruct on any lesser included offense by stating that he only considered and rejected instructions on attempt, and the "lesser of annoying phone call misdemeanors." We need not decide whether the doctrine of invited error applies because we shall hold that section 71 was not a lesser included offense.

threat, even if there is no intent of actually carrying it out." (See *People v. Toledo* (2001) 26 Cal.4th 221, 227.) Therefore, a violation of section 422 can be committed without violating section 71, and section 71 is not a necessarily included lesser offense.

Under the accusatory pleading test the court looks to whether " ' " 'the charging allegations of the accusatory pleading include language describing the offense in such a way that if committed as specified [some] lesser offense is necessarily committed.' " ' " (*People v. Montoya* (2004) 33 Cal.4th 1031, 1035.) "Consistent with the primary function of the accusatory pleading test—to determine whether a defendant is entitled to instruction on a lesser uncharged offense—we consider *only* the pleading for the greater offense." (*Id.* at p. 1036.) Defendant correctly contends that, because the information alleged that defendant did "willfully and unlawfully threaten to commit a crime resulting in death or great bodily injury to *Det.* Mark Pollio with the specific intent that the statement be taken as a threat," the pleading of the 422 violation encompassed the first two elements of section 71, i.e., a threat to a *public officer to inflict unlawful injury upon a person.* The fourth element of a section 71 violation , i.e., the apparent ability to carry out the threat, is also arguably encompassed by the specific factual pleading that "Det. Mark Pollio was reasonably in sustained fear of [his] safety or the safety of [his] immediate family."

Nonetheless, the third element of section 71, i.e., the specific intent to influence the performance of Detective Pollio's duties, by causing or attempting to cause him "to do, or refrain from doing, any act in the performance of his duties," is not encompassed by the allegations of the accusatory pleading. (§ 71.) In support of his contention that it is, defendant relies upon *In re Marcus T.* (2001) 89 Cal.App.4th 468 (*Marcus T.*). We, however, cannot agree with *Marcus T.*, to the extent that it reasoned that merely because the pleading describes the victim as a public officer, the language alleging the specific intent that "the statement be taken as a threat," as required by section 422, necessarily encompasses the intent to "cause and attempt to cause [the victim] to do, and refrain from doing, an act in the performance of duty." (*Marcus T.*, *supra*, at p. 473.) The court in *Marcus T.* reasoned that the "essence of a threat is a 'declaration of hostile determination

or of loss, pain, punishment, or damage to be inflicted in retribution for or conditionally upon some course. . . . Thus, the intent alleged to violate section 422 directed as it was in this case toward a public officer, encompassed the intent alleged to violate section 71." (*Ibid.*) It does not, however, follow from the mere fact that the alleged threat is directed at a public officer, in this case, "Det. Pollio," and was made "with the specific intent that the statement be taken as a threat," that the defendant also had the specific intent required under section 71. A threat, even when directed to a person who is a public officer, may be made in "retribution for," or "conditionally upon some act" committed in his or her personal life unrelated to the performance of any of his or her duties and without any intent to influence performance of those duties. During a bitter divorce, for example, a person could threaten a spouse, who also happens to be a police officer, with serious bodily injury in retribution for, or conditionally upon relinquishing, a claim to sole custody of the children. Nothing in the language of the accusatory pleading refers to the content of the threat, or the circumstances in which the threat was uttered, which would support the conclusion that as alleged in the accusatory pleading, defendant could not have committed the section 422 violation without also committing the section 71 violation. For the purpose of determining whether section 71 was a lesser included offense, it also is irrelevant whether the evidence at trial would have supported this element.[6]

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[6] We also note that in *Marcus T.*, *supra*, 89 Cal.App.4th 468, the court was not addressing the question whether the trial court had a sua sponte duty to instruct on section 71 as a lesser included offense of a section 422 violation. The juvenile in that case had been charged with, and was found to have violated, both sections 71 and 422, based upon the same act of threatening a school police officer. On appeal, the minor argued the finding of the section 422 violation should be reversed because the two crimes were based on the same act, and the section 422 violation was a lesser included offense of section 71. (See *People v. Sanchez* (2001) 24 Cal.4th 983, 987 [where conviction of two crimes is based upon the same act, and one offense is a lesser included of the former, only the conviction of the greater should stand].) The *Marcus T.* court rejected this argument, but did hold that on the facts *as proven at trial* the section 71 violation was a lesser and necessarily included crime of the threat against a public officer under section 422. It therefore remanded the matter to allow the juvenile court to exercise its discretion to strike the finding that appellant violated Penal Code section 71. Although not a

III.

Penal Code § 1465.8 Fee

Defendant's final contention is that the court was not authorized to impose a $20 court security fee because he committed the offenses on April 25, 2003, before section 1465.8 went into effect in August 2003 (Stats. 2003, ch. 159, § 27.) He was not convicted until January 23, 2004, and the court imposed the fee at the sentencing on March 19, 2004.

Defendant argues that, in the absence of an express declaration of retroactivity, penal provisions are generally not retroactively applied, and therefore imposition of the fee was unauthorized and must be stricken (§ 3; *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1209.) Defendant's underlying premise is that it is the date of commission of the offense that is the operative act relevant to the effective date of section 1465.8. Yet, section 1465.8, subdivision (a)(1), provides in pertinent part: "To ensure and maintain adequate funding for court security, a fee of twenty dollars ($20) shall be imposed *on every conviction* for a criminal offense (italics added). . . ." Thus, under the plain terms of section 1465.8, the operative act is the judgment of conviction, not the commission of an act that violates the Penal Code. Section 1465.8 therefore applies prospectively to all defendants *convicted* on or after its effective date. (See, e.g., *In re DeLong* (2001) 93 Cal.App.4th 562, 567 [plain meaning of language of § 1210.1, subd. (a) that "any person *convicted* of a nonviolent drug possession offense shall receive probation" meant that statute operated prospectively from date of conviction, not date of commission of offense].) Moreover, section 1465.8 does not criminalize an act that occurred prior to its effective date. It merely assesses a fee of $20 on a criminal conviction. (See *People v. Wallace* (2004) 120 Cal.App.4th 867, 878 [holding that

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dispositive factor in the court's analysis, the *Marcus T.* court also faced the unusual circumstance that the trial court itself had indicated that it desired to exercise its discretion to treat the two felonies as one, and wanted to amend the complaint to conform to proof. The trial court said it would have "welcomed a suggestion as to how to accomplish this end." (*Marcus T.* at p. 474.)

imposing a security fee upon conviction of an offense committed prior to the effective date of section 1465.8 does not violate the ex post facto clause].) Defendant was convicted on January 23, 2004, after the effective date of section 1465.8, and the court therefore properly imposed the security fee.

CONCLUSION

The judgment is affirmed.

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STEIN, Acting P.J.

We concur:

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SWAGER, J.

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MARGULIES, J.

Trial Court:	The Superior Court of San Mateo County
Trial Judge:	Hon. Dale A. Hahn
Counsel for Plaintiff and Appellant:	Matthew Zwerling Executive Director L. Richard Braucher Staff Attorney First District Appellate Project
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